

# HOUSE BILL No. 1265

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 22-2-2.

**Synopsis:** Indiana minimum wage. Provides that employers that are subject to the minimum wage provisions of the federal Fair Labor Standards Act are subject to the Indiana minimum wage. (Current law provides that employers that are subject to the minimum wage provisions of the federal Fair Labor Standards Act are not subject to the Indiana minimum wage.) Provides that the Indiana minimum wage is inapplicable to employees who provide companionship services to the aged and infirm. Removes outdated language concerning the Indiana minimum wage. Relocates language concerning the tip credit.

**Effective:** July 1, 2016.

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## Bartlett, Moseley

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January 11, 2016, read first time and referred to Committee on Employment, Labor and Pensions.

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Second Regular Session of the 119th General Assembly (2016)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2015 Regular Session of the General Assembly.

## HOUSE BILL No. 1265

A BILL FOR AN ACT to amend the Indiana Code concerning labor and safety.

*Be it enacted by the General Assembly of the State of Indiana:*

1       SECTION 1. IC 22-2-2-3 IS AMENDED TO READ AS FOLLOWS  
2       [EFFECTIVE JULY 1, 2016]: Sec. 3. As used in this chapter:

3       "Commissioner" means the commissioner of labor or the  
4       commissioner's authorized representative.

5       "Department" means the department of labor.

6       "Occupation" means an industry, trade, business, or class of work  
7       in which employees are gainfully employed.

8       "Employer" means any individual, partnership, association, limited  
9       liability company, corporation, business trust, the state, or other  
10      governmental agency or political subdivision during any work week in  
11      which they have two (2) or more employees. ~~However, it shall not~~  
12      ~~include any employer who is subject to the minimum wage provisions~~  
13      ~~of the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C.~~  
14      ~~201-209).~~

15      "Employee" means any person employed or permitted to work or  
16      perform any service for remuneration or under any contract of hire,  
17      written or oral, express or implied by an employer in any occupation,



1 but shall not include any of the following:

2 (a) Persons less than sixteen (16) years of age.

3 (b) Persons engaged in an independently established trade,  
4 occupation, profession, or business who, in performing the  
5 services in question, are free from control or direction both under  
6 a contract of service and in fact.

7 (c) Persons performing services not in the course of the  
8 employing unit's trade or business.

9 (d) Persons employed on a commission basis.

10 (e) Persons employed by their own parent, spouse, or child.

11 (f) Members of any religious order performing any service for that  
12 order, any ordained, commissioned, or licensed minister, priest,  
13 rabbi, sexton, or Christian Science reader, and volunteers  
14 performing services for any religious or charitable organization.

15 (g) Persons performing services as student nurses in the employ  
16 of a hospital or nurses training school while enrolled and  
17 regularly attending classes in a nurses training school chartered  
18 or approved under law, or students performing services in the  
19 employ of persons licensed as both funeral directors and  
20 embalmers as a part of their requirements for apprenticeship to  
21 secure an embalmer's license or a funeral director's license from  
22 the state, or during their attendance at any schools required by law  
23 for securing an embalmer's or funeral director's license.

24 (h) Persons who have completed a four (4) year course in a  
25 medical school approved by law when employed as interns or  
26 resident physicians by any accredited hospital.

27 (i) Students performing services for any school, college, or  
28 university in which they are enrolled and are regularly attending  
29 classes.

30 (j) Persons with physical or mental disabilities performing  
31 services for nonprofit organizations organized primarily for the  
32 purpose of providing employment for persons with disabilities or  
33 for assisting in their therapy and rehabilitation.

34 (k) Persons employed as insurance producers, insurance  
35 solicitors, and outside salesmen, if all their services are performed  
36 for remuneration solely by commission.

37 (l) Persons performing services for any camping, recreational, or  
38 guidance facilities operated by a charitable, religious, or  
39 educational nonprofit organization.

40 (m) Persons engaged in agricultural labor. The term shall include  
41 only services performed:

42 (1) on a farm, in connection with cultivating the soil, or in



connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment if the major part of the service is performed on a farm;

(3) in connection with:

(A) the production or harvesting of maple sugar or maple syrup or any commodity defined as an agricultural commodity in the Agricultural Marketing Act, as amended (12 U.S.C. 1141j);

(B) the raising or harvesting of mushrooms;

(C) the hatching of poultry; or

(D) the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes; and

(4) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage, to market, or to a carrier for transportation to market, any agricultural or horticultural commodity, but only if service is performed as an incident to ordinary farming operation or, in the case of fruits and vegetables, as an incident to the preparation of fruits and vegetables for market. However, this exception shall not apply to services performed in connection with any agricultural or horticultural commodity after its delivery to a terminal market or processor for preparation or distribution for consumption.

As used in this subdivision, "farm" includes stock, dairy, poultry, fruit, furbearing animals, and truck farms, nurseries, orchards, or greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities.

(n) Those persons employed in executive, administrative, or professional occupations who have the authority to employ or discharge and who earn one hundred fifty dollars (\$150) or more a week, and outside salesmen.

(o) Any person not employed for more than four (4) weeks in any four (4) consecutive three (3) month periods.

(p) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum



hours of service under the federal Motor Carrier Act of 1935 (49 U.S.C. 304(3)) or any employee of a carrier subject to IC 8-2.1.

SECTION 2. IC 22-2-2-4, AS AMENDED BY P.L.165-2007, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2016]: Sec. 4. (a) Every employer employing four (4) or more employees during a work week shall:

(1) in any work week beginning on or after July 1, 1968; in which the employer is subject to the provisions of this chapter; pay each of the employer's employees wages of not less than one dollar and twenty-five cents (\$1.25) per hour;

(2) in any work week beginning on or after July 1, 1977; in which the employer is subject to this chapter; pay each of the employer's employees wages of not less than one dollar and fifty cents (\$1.50) per hour;

(3) in any work week beginning on or after January 1, 1978; in which the employer is subject to this chapter; pay each of the employer's employees wages of not less than one dollar and seventy-five cents (\$1.75) per hour; and

(4) in any work week beginning on or after January 1, 1979; in which the employer is subject to this chapter; pay each of the employer's employees wages of not less than two dollars (\$2) per hour.

(b) Except as provided in subsection (c), every employer employing at least two (2) employees during a work week shall; in any work week in which the employer is subject to this chapter; pay each of the employees in any work week beginning on and after July 1, 1990; and before October 1, 1998; wages of not less than three dollars and thirty-five cents (\$3.35) per hour.

(c) An employer subject to subsection (b) is permitted to apply a "tip credit" in determining the amount of cash wage paid to tipped employees. In determining the wage an employer is required to pay a tipped employee; the amount paid the employee by the employee's employer shall be an amount equal to:

(1) the cash wage paid the employee; which for purposes of the determination shall be not less than the cash wage required to be paid to employees covered under the federal Fair Labor Standards Act of 1938; as amended (29 U.S.C. 203(m)(1)) on August 20, 1996; which amount is two dollars and thirteen cents (\$2.13) an hour; and

(2) an additional amount on account of the tips received by the employee; which amount is equal to the difference between the wage specified in subdivision (1) and the wage in effect under



subsections (b), (f), (g), and (h):

An employer is responsible for supporting the amount of tip credit taken through reported tips by the employees:

(d) (a) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which employees are employed, between employees on the basis of sex by paying to employees in such establishment a rate less than the rate at which the employer pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to:

(1) a seniority system;

(2) a merit system;

(3) a system which measures earnings by quantity or quality of production; or

(4) a differential based on any other factor other than sex.

(e) (b) An employer who is paying a wage rate differential in violation of subsection (d) (a) shall not, in order to comply with subsection (d), (a), reduce the wage rate of any employee, and no labor organization, or its agents, representing employees of an employer having employees subject to subsection (d) (a) shall cause or attempt to cause such an employer to discriminate against an employee in violation of subsection (d), (a).

(f) Except as provided in subsection (e), every employer employing at least two (2) employees during a work week shall, in any work week in which the employer is subject to this chapter, pay each of the employees in any work week beginning on or after October 1, 1998, and before March 1, 1999, wages of not less than four dollars and twenty-five cents (\$4.25) per hour.

(g) Except as provided in subsections (e) and (j), every employer employing at least two (2) employees during a work week shall, in any work week in which the employer is subject to this chapter, pay each of the employees in any work week beginning on or after March 1, 1999, and before July 1, 2007, wages of not less than five dollars and fifteen cents (\$5.15) an hour.

(h) (c) Except as provided in subsections (e) (d) and (j), (e), every employer employing at least two (2) employees during a work week shall, in any work week in which the employer is subject to this chapter, pay each of the employees in any work week beginning on or after June 30, 2007, wages of not less than the minimum wage payable under the federal Fair Labor Standards Act of 1938, as amended (29



U.S.C. 201 et seq.).

**(d) An employer subject to subsection (c) is permitted to apply a tip credit in determining the amount of cash wage paid to tipped employees. In determining the wage an employer is required to pay a tipped employee, the amount paid to the employee by the employee's employer shall be an amount equal to:**

**(1) the cash wage paid to the employee, which for purposes of the determination shall be not less than the cash wage required to be paid to employees covered under the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203(m)(1)) on August 20, 1996, which amount is two dollars and thirteen cents (\$2.13) an hour; and**

**(2) an additional amount on account of the tips received by the employee, which amount is equal to the difference between the wage specified in subdivision (1) and the wage in effect under subsection (c).**

**An employer is responsible for supporting the amount of tip credit taken through reported tips by the employees.**

~~(i)~~ This section does not apply if an employee:

~~(1)~~ provides companionship services to the aged and infirm (as defined in 29 CFR 552.6); and

~~(2)~~ is employed by an employer or agency other than the family or household using the companionship services; as provided in 29 CFR 552.109 (a).

~~(j)~~ **(e)** This subsection applies only to an employee who has not attained the age of twenty (20) years. Instead of the rates prescribed by subsections (c) ~~(f)~~; ~~(g)~~; and ~~(h)~~; **(d)**, an employer may pay an employee of the employer, during the first ninety (90) consecutive calendar days after the employee is initially employed by the employer, a wage which is not less than

~~(1)~~ four dollars and twenty-five cents (\$4.25) per hour, effective March 1, 1999; and

~~(2)~~ the amount payable under the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), during the first ninety (90) consecutive calendar days after initial employment to an employee who has not attained twenty (20) years of age. effective July 1, 2007.

However, no employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in this subsection.

~~(k)~~ **(f)** Except as otherwise provided in this section, no employer



shall employ any employee for a work week longer than forty (40) hours unless the employee receives compensation for employment in excess of the hours above specified at a rate not less than one and one-half (1.5) times the regular rate at which the employee is employed.

(g) For purposes of this section the following apply:

(1) "Overtime compensation" means the compensation required by subsection ~~(k)~~: (f).

(2) "Compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable work week or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(3) "Regular rate" means the rate at which an employee is employed is considered to include all remuneration for employment paid to, or on behalf of, the employee, but is not considered to include the following:

(A) Sums paid as gifts, payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.

(B) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of the employer's interests and properly reimbursable by the employer, and other similar payments to an employee which are not made as compensation for the employee's hours of employment.

(C) Sums paid in recognition of services performed during a given period if:

(i) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect the payments regularly;

(ii) the payments are made pursuant to a bona fide profit sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the administrator set forth in appropriately issued regulations, having due regard among other relevant factors, to the extent to which the amounts





1 paid to the employee are determined without regard to hours  
2 of work, production, or efficiency; or

3 (iii) the payments are talent fees paid to performers,  
4 including announcers, on radio and television programs.

5 (D) Contributions irrevocably made by an employer to a  
6 trustee or third person pursuant to a bona fide plan for  
7 providing old age, retirement, life, accident, or health  
8 insurance or similar benefits for employees.

9 (E) Extra compensation provided by a premium rate paid for  
10 certain hours worked by the employee in any day or work  
11 week because those hours are hours worked in excess of eight  
12 (8) in a day or in excess of the maximum work week  
13 applicable to the employee under subsection ~~(k)~~ (f) or in  
14 excess of the employee's normal working hours or regular  
15 working hours, as the case may be.

16 (F) Extra compensation provided by a premium rate paid for  
17 work by the employee on Saturdays, Sundays, holidays, or  
18 regular days of rest, or on the sixth or seventh day of the work  
19 week, where the premium rate is not less than one and one-half  
20 (1.5) times the rate established in good faith for like work  
21 performed in nonovertime hours on other days.

22 (G) Extra compensation provided by a premium rate paid to  
23 the employee, in pursuance of an applicable employment  
24 contract or collective bargaining agreement, for work outside  
25 of the hours established in good faith by the contract or  
26 agreement as the basic, normal, or regular workday (not  
27 exceeding eight (8) hours) or work week (not exceeding the  
28 maximum work week applicable to the employee under  
29 subsection ~~(k)~~(f)) where the premium rate is not less than one  
30 and one-half (1.5) times the rate established in good faith by  
31 the contract or agreement for like work performed during the  
32 workday or work week.

33 ~~(m)~~ (h) No employer shall be considered to have violated subsection  
34 ~~(k)~~ (f) by employing any employee for a work week in excess of that  
35 specified in subsection ~~(k)~~ (f) without paying the compensation for  
36 overtime employment prescribed therein if the employee is so  
37 employed:

38 (1) in pursuance of an agreement, made as a result of collective  
39 bargaining by representatives of employees certified as bona fide  
40 by the National Labor Relations Board, which provides that no  
41 employee shall be employed more than one thousand forty (1,040)  
42 hours during any period of twenty-six (26) consecutive weeks; or



(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two (52) consecutive weeks the employee shall be employed not more than two thousand two hundred forty (2,240) hours and shall be guaranteed not less than one thousand eight hundred forty (1,840) hours (or not less than forty-six (46) weeks at the normal number of hours worked per week, but not less than thirty (30) hours per week) and not more than two thousand eighty (2,080) hours of employment for which the employee shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum work week applicable to the employee under subsection ~~(k)~~ (f) or two thousand eighty (2,080) in that period at rates not less than one and one-half (1.5) times the regular rate at which the employee is employed.

~~(n)~~ (i) No employer shall be considered to have violated subsection ~~(k)~~ (f) by employing any employee for a work week in excess of the maximum work week applicable to the employee under subsection ~~(k)~~ (f) if the employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of the employee necessitate irregular hours of work, and the contract or agreement includes the following:

(1) Specifies a regular rate of pay of not less than the minimum hourly rate provided in subsections (c), ~~(h)~~, (d), and ~~(j)~~ (e), (whichever is applicable) and compensation at not less than one and one-half (1.5) times that rate for all hours worked in excess of the maximum work week.

(2) Provides a weekly guaranty of pay for not more than sixty (60) hours based on the rates so specified.

~~(o)~~ (j) No employer shall be considered to have violated subsection ~~(k)~~ (f) by employing any employee for a work week in excess of the maximum work week applicable to the employee under that subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by the employee in the work week in excess of the maximum work week applicable to the employee under that subsection:

(1) in the case of an employee employed at piece rates, is



1 computed at piece rates not less than one and one-half (1.5) times  
 2 the bona fide piece rates applicable to the same work when  
 3 performed during nonovertime hours;

4 (2) in the case of an employee performing two (2) or more kinds  
 5 of work for which different hourly or piece rates have been  
 6 established, is computed at rates not less than one and one-half  
 7 (1.5) times those bona fide rates applicable to the same work  
 8 when performed during nonovertime hours; or

9 (3) is computed at a rate not less than one and one-half (1.5) times  
 10 the rate established by the agreement or understanding as the  
 11 basic rate to be used in computing overtime compensation  
 12 thereunder, provided that the rate so established shall be  
 13 substantially equivalent to the average hourly earnings of the  
 14 employee, exclusive of overtime premiums, in the particular work  
 15 over a representative period of time;

16 and if the employee's average hourly earnings for the work week  
 17 exclusive of payments described in this section are not less than the  
 18 minimum hourly rate required by applicable law, and extra overtime  
 19 compensation is properly computed and paid on other forms of  
 20 additional pay required to be included in computing the regular rate.

21 ~~(p)~~ **(k)** Extra compensation paid as described in this section shall be  
 22 creditable toward overtime compensation payable pursuant to this  
 23 section.

24 ~~(q)~~ **(l)** No employer shall be considered to have violated subsection  
 25 ~~(k)~~ **(f)** by employing any employee of a retail or service establishment  
 26 for a work week in excess of the applicable work week specified  
 27 therein, if:

28 (1) the regular rate of pay of the employee is in excess of one and  
 29 one-half (1.5) times the minimum hourly rate applicable to the  
 30 employee under section 2 of this chapter; and

31 (2) more than half of the employee's compensation for a  
 32 representative period (not less than one (1) month) represents  
 33 commissions on goods or services.

34 In determining the proportion of compensation representing  
 35 commissions, all earnings resulting from the application of a bona fide  
 36 commission rate shall be considered commissions on goods or services  
 37 without regard to whether the computed commissions exceed the draw  
 38 or guarantee.

39 ~~(r)~~ **(m)** No employer engaged in the operation of a hospital or an  
 40 establishment which is an institution primarily engaged in the care of  
 41 the sick, the aged, or individuals with a mental illness or defect who  
 42 reside on the premises shall be considered to have violated subsection



~~(k)~~ (f) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen (14) consecutive days is accepted in lieu of the work week of seven (7) consecutive days for purposes of overtime computation and if, for the employee's employment in excess of eight (8) hours in any workday and in excess of eighty (80) hours in that fourteen (14) day period, the employee receives compensation at a rate not less than one and one-half (1.5) times the regular rate at which the employee is employed.

~~(s)~~ (n) No employer shall employ any employee in domestic service in one (1) or more households for a work week longer than forty (40) hours unless the employee receives compensation for that employment in accordance with subsection ~~(k)~~: (f).

~~(t)~~ (o) In the case of an employee of an employer engaged in the business of operating a street, a suburban or interurban electric railway, or a local trolley or motorbus carrier (regardless of whether or not the railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection ~~(k)~~ (f) applies, there shall be excluded the hours the employee was employed in charter activities by the employer if both of the following apply:

(1) The employee's employment in the charter activities was pursuant to an agreement or understanding with the employer arrived at before engaging in that employment.

(2) If employment in the charter activities is not part of the employee's regular employment.

~~(u)~~ (p) Any employer may employ any employee for a period or periods of not more than ten (10) hours in the aggregate in any work week in excess of the maximum work week specified in subsection ~~(k)~~ (f) without paying the compensation for overtime employment prescribed in subsection ~~(k)~~: (f), if during that period or periods the employee is receiving remedial education that:

(1) is provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) is designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

~~(v)~~ (q) Subsection ~~(k)~~ (f) does not apply to an employee of a motion picture theater.

~~(w)~~ (r) Subsection ~~(k)~~ (f) does not apply to an employee of a seasonal amusement or recreational establishment, an organized camp, or a religious or nonprofit educational conference center that is exempt



under the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213).

**(s) For purposes of this section, "companionship services to the aged and infirm":**

**(1) includes the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself. The term also includes the provision of care if the care is provided attendant to and in conjunction with the provision of fellowship and protection and if it does not exceed twenty percent (20%) of the total hours worked per person and per workweek. The provision of:**

**(A) fellowship means to engage the person in social, physical, and mental activities, including conversation, reading, games, crafts, or accompanying the person on walks, on errands, to appointments, or to social events;**

**(B) protection means to be present with the person in his or her home or to accompany the person when outside of the home in order to monitor the person's safety and well being; and**

**(C) care means to assist the person with activities of daily living (including dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living, which are tasks that enable a person to live independently at home (including meal preparation, driving, light housework, managing finances, assistance with the physical taking of medications, and arranging medical care); and**

**(2) does not:**

**(A) include domestic services performed primarily for the benefit of other members of the household; and**

**(B) include the performance of medically related services provided for the person. The determination of whether services are medically related is based on whether the services typically require and are performed by trained personnel, including registered nurses, licensed practical nurses, or certified assistants. The determination is not based on actual training or the occupational title of the individual performing the services.**

**(t) This section does not apply if an employee provides companionship services to the aged and infirm. Third party employers of employees engaged in companionship services to the**



1     **aged and infirm may not avail themselves of the exemption**  
2     **provided by this section even if the employee is jointly employed by**  
3     **the individual or member of the family or household using the**  
4     **services. However, the individual or member of the family or**  
5     **household, even if considered a joint employer, is still entitled to**  
6     **assert the exemption, if the employee meets all of the requirements**  
7     **of providing companionship services to the aged and infirm as**  
8     **defined in this section.**

